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In The

Supreme Court of the United States

October Term, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
H. L. SMITH, G. D. McLAUGHLIN
and L. D. WILSON,

Petitioners,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
LOUISIANA & ARKANSAS RAILWAY, and
UNITED TRANSPORTATION UNION,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

As we explained in our Petition, this case involves issues of substantial public importance: whether employees covered by the Railway Labor Act, ("RLA") 45 U.S.C. §§ 151 *et seq.*, have the same rights of freedom of association in the payment of union fees and freedom from compulsory dual unionism as do their counterparts under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*, or, instead, may be required to pay union fees in order to maintain and accumulate seniority

in a craft while forced to work in another craft represented by a different union. The conclusion reached by the Court of Appeals for the Eighth Circuit, which tracks the decision of the Seventh Circuit in *Dempsey v. Atchison, Topeka and Santa Fe Ry. Co.*, 16 F.3d 382 (7th Cir. 1994), *pet. for cert. pending*, No. 93-2015 (June 21, 1994), is in direct conflict with rulings under the NLRA of this Court, the various courts of appeals, including the Seventh and Eighth Circuits, and the National Labor Relations Board. If the decision below is permitted to stand, petitioners respectfully submit that employees under the RLA will receive vastly different treatment as to payment of union fees than those employees covered by the NRLA, even though this Court has consistently held that the permissible scope of union fee arrangements under the federal labor law is identical for railway employees, public employees and all other employees. *See Communications Workers v. Beck*, 487 U.S. 735, 762 (1988).

The effort of respondent United Transportation Union ("UTU") to depict this case as unique and not likely to lead to substantial labor disruptions in the future is refuted by the labor dispute that arose between the Soo Line Railroad and UTU following the filing of our petition in this case. One of the major items that UTU was demanding from that rail carrier was a seniority maintenance fee agreement. L. Kaufman, "Engineers Return As Talks Continue To End Soo Strike." *Journal of Commerce*, (Aug. 25, 1994), p. 1A. This strike and UTU's refusal to withdraw this demand, among others, eventually led to the appointment of Presidential Emergency Board No. 225 pursuant to Section 10 of the RLA, 45 U.S.C. § 160. *See* EXEC. ORDER 12925. 59 Fed. Reg. 48181 (Aug. 31, 1994).

As the next round of negotiations rears its head in the rail industry, it can be expected that UTU will expand its efforts to obtain these fee requirements, which will lead to labor turmoil adverse to the public interest. Conversely, petitioner Brotherhood of Locomotive Engineers ("BLE") will resist and may also pursue efforts to obtain similar or even broader fee arrangements, thereby requiring locomotive engineers/train service employees to pay fees to both unions in violation of the clear language of 45 U.S.C. § 152 Eleventh (c). In short, the public and the individual employees will bear the brunt of this dispute until an authoritative resolution of the validity of such arrangement is rendered.

UTU's sole effort to distinguish this case from the established precedent under the federal labor law developed under the NLRA is that it falls under a different statute, the RLA. That the issue arises under the RLA, not the NLRA, is insufficient in itself to justify the decision below. In fact, neither the court below nor UTU has ever explained how this fee agreement is valid under the RLA, when the sole kind of fee agreement permissible under Sections 2 Fourth and Eleventh is what is called a union shop provision, which respondents say the side letter is not.

If the side letter to the arbitration award, which sets forth the requirement that "full dues to the UTU" will be required in order to maintain and accumulate train service seniority, is not a qualified union security agreement under Section 2 Eleventh (a) of the RLA, 45 U.S.C. § 152 Eleventh (a), it is banned by the unequivocal language of Section 2 Fourth, 45 U.S.C. § 152 Fourth, which bars railroads from collecting or assisting in the collection of

monies for unions from its employees. Standing the statute on its head, the court below assumed without explanation that any union fee arrangement that is not a "union shop" agreement, which it defines as a requirement to pay a fee to prevent employment termination, can be legally imposed by an employer and union upon any employee. However, if UTU's seniority maintenance fee must qualify as a union security arrangement within the meaning of Section 2 Eleventh (a), and does so qualify, it nonetheless is prohibited as to the individual petitioners by reason of Section 2 Eleventh (c), which permits any operating employee, engineer or trainperson, to pay dues to either BLE or UTU in satisfaction of any such requirement. *See Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480, 490-492 (1957); *Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969); *O'Connell v. Erie Lackawanna R. Co.*, 391 F.2d 156 (2nd Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969).

Moreover, the union fee provisions of the RLA and NLRA have been considered to be statutory equivalents, and the precedent under one statute has been uniformly applied to the other. *Communications Workers v. Beck*, 487 U.S. 737, 745-747 & nn. 3, 4 (1988). The response in the opinion below and by UTU is only that this is not a union shop agreement. This reply is totally inadequate in light of the three facet test recently expressed by the Court, which is easily met in this case, for the common purposes of the equivalent statutory provisions, their parallel development, and desired uniformity or harmony between these provisions dictates that the well-established precedent under the NLRA should be applied in this similar RLA situation. *See Hawaiian Airlines, Inc. v.*

Norris, 512 U.S. ___, 62 U.S.L.W. 4537, at 4542 n. 9 (U.S. June 20, 1994).

The NLRA precedent requires the conclusion that Side Letter No. 3 is illegal on its face. Any scheme that has the effect (even unintended) of encouraging or discouraging employees in their attitudes toward union membership or the payment of dues to the union, including one that could cause a loss of or reduction in seniority ranking as a result of nonpayment or fosters different treatment as to wages or vacation benefits, is illegal under the NLRA. *Radio Officers v. NLRB*, 347 U.S. 17 (1954). In sum, the scheme is outlawed, even though nonpayment causes disparate treatment of a nature that is less than loss of the person's job. *See Pattern Makers' League v. NLRB*, 473 U.S. 95, 107 (1985).

In addition to the prohibition contained in the specific language of Sections 2 Fourth and Eleventh, the seniority protection scheme, which in effect represents a UTU organizational protection scheme, conflicts with the policy of free choice and union voluntarism set forth in both the RLA and NLRA. *Ellis v. Brotherhood of Railway and Airline Clerks*, 466 U.S. 435, 445-447 (1984); *Pattern Makers' League v. NLRB*, 473 U.S. 95, 127 (1985). Any dues collection scheme that encourages dues payments to one union and discourages dues payments or membership in another union, even though it does not affect the employee's continued employment with the employer, violates Sections 2 Third, Fourth and Eleventh of the RLA. Therefore, even though the engineers/trainmen may only suffer a reduction in trainmen's seniority ranking, the anti-BLE effects of the scheme should have been reasonably anticipated by the railroad and UTU, and

petitioners were not required to produce any admission by KCS or UTU that the agreement was intended to encourage membership in UTU at the expense of BLE. *Radio Officers v. NLRB*, 347 U.S. 17 at 39-40, 42 (1954).

The lower courts also rejected this contention on the basis that the statutory design under the RLA is different from that of the NLRA. In addition, the court below concluded that since this was postcertification conduct, the rationale enunciated in *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426 (1989), did not permit a holding that the seniority protection fee was illegal as a matter of law. Rather, in the lower court's view, petitioners were required to produce evidence that Kansas City Southern was motivated by anti-union animus or was attempting to interfere with the choice of its engineer employees of the BLE as their collective bargaining representative. Under the Court of Appeals' ruling, the determination as to the legality of the seniority maintenance fee must wait until its effects upon BLE can be determined in the future. This "wait-and-see" approach is factually and legally defective.

The "wait-and-see" approach is illogical: Does BLE have to wait until UTU is able to successfully mount a representation election before the scheme may be considered an attempt to interfere with BLE's choice as the craft representative for locomotive engineers? To wait until BLE's financial support has been eroded may be too late to act in light of the six-month limitations period under *DelCostello v. Teamsters*, 462 U.S. 151 (1983). *See Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co.*, 768 F.2d 914 (7th Cir. 1985). Furthermore, where, as here, there is a clear statutory violation of Section 2

Fourth, *i.e.*, the collection of union fees other than union shop obligations, and, where as here, there is no satisfactory forum other than the federal courts to resolve the dispute and with authority to issue an appropriate remedy, the courts should rule on the controversy without a prior factual showing of intended interference or coercion. *Virginian Ry. v. System Fed. No. 40*, 300 U.S. 515 (1937); *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426, 441 (1989). As we pointed out in our Petition, contract validity questions are for the courts and this case involves a contract validity question. Pet. 19. The contractual validity test is the only appropriate standard to follow in this case – not a wait-and-see approach.

UTU has offered no justification whatsoever for relieving the carrier and it from the Section 2 Fourth obligation or for denying the employees involved of their right to join the union of their choice and their additional right to be free of compulsory dual unionism as set forth in Section 2 Eleventh (c). Assuming for the sake of argument that fee requirements that are something less than union shop agreements are permissible – and we do not suggest they are – this side letter does not qualify. First, the side letter requires payment of "full dues." The term "full dues" is clearly an euphemism for "UTU membership." Moreover, contrary to the suggestion of UTU, the side letter specifies that "full dues" must be paid to "maintain" train service seniority. The payment is not limited to accumulation of future credits. Under the circumstances, it is distinctly clear to every trainman/engineer that payment of the "full dues" to UTU will meet both UTU's seniority maintenance fee requirement and

the BLE/UTU union shop requirement, thereby encouraging membership in UTU and discouraging membership in BLE. UTU and the carrier had to understand that at the time the side letter was imposed. Accordingly, the railroad employer and UTU, as reasonably intelligent entities, had to know that the side letter struck a fundamental blow to BLE's status as craft bargaining agent and to the collective bargaining process itself. And the Court of Appeals for the Eighth Circuit recognized this theory in an NLRA case decided after the decision it handed down herein. In *Bloom v. NLRB,* 146 LRRM (BNA) 2986 (8th Cir. 1994), that court refused to enforce a settlement over a union shop clause that used the phrase "member in good standing," because that language "implied" that the clause could be used to indirectly enforce non-financial union regulations. *Id.*, 2989. That same logic required Side Letter No. 3 be set aside as violating the RLA.

Finally, some note must be taken of UTU's assertion that petitioners had no RLA right to notice of or participation in the arbitration that led to the insertion of side Letter No. 3 to the Award and that the side letter was within the jurisdiction of Crew Consist Arbitration Board No. 4. While the court below and UTU claim there is no substance to this issue, the Board itself perceived some difficulty with it, stating:

> Finally, it should be pointed out that, subsequent to the oral arguments on december (sic) 18 and 19, 1991, this Board encouraged the parties to try to find solutions to as many of their problems as possible. In some areas, the parties were successful. This would explain certain terms and conditions below which appear to be technically outside the parameters of this

> Board's jurisdiction, as well as beyond the issues initially submitted to this Board for resolution. Those terms and conditions were added at the request and by the agreement of the parties, including the Questions and Answers.

A.A.36.

That the Award and side letter between KCS and the trainmen's union dealt with matters arising in and involving the craft of locomotive engineers certainly made it suspect and gave the document the aura of crossing into matters within BLE's jurisdiction and interfering with its collective bargaining rights and responsibilities. Where the matter of union fee payments, among others, had been since at least 1951 the subject of joint handling and similar agreements and where any tampering with that arrangement could affect the financial viability of the organization and its ability to administer its bargaining agreements for persons working as locomotive engineers, BLE had a bargainable interest in the subject matter of Side Letter No. 3 and should have been given notice and allowed to participate in those negotiations. *See, e.g., Virginian Ry. v. System Fed. No. 40,* 300 U.S. 515 (1937); *Illinois Central R. Co. v. Brotherhood of Locomotive Engineers,* 443 F.2d 136 (7th Cir. 1971). Under the circumstances existing here, the side letter was not within the jurisdiction of the Board and should have been set aside.

CONCLUSION

For these reasons and those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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